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AFFIN-ACF FINANCE BHD

v.

GREEN FORMATION SDN BHD

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HIGH COURT MALAYA, MELAKA

LOW HOP BING J

[ORIGINATING SUMMONS NO: 24-427-2004]

6 JULY 2006

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LAND LAW: Charge - Order for sale - Application for - Issues raised - Whether letter of offer within definition of 'promissory note' under s. 2 Stamp Act 1949 - Whether an instrument chargeable with stamp duty under s. 41(1) Stamp Act 1949 - Whether cause to the contrary established

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LAND LAW: Charge - Order for sale - Application for - Issues raised - Government acquisition of part of charged land - *Chung Khiaw Bank Ltd v. The Government of the State of Sabah & Ors* - Whether cause to the contrary established

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CIVIL PROCEDURE: Action - *Res judicata* - Entry of summary judgment - Whether charge action an abuse of court process - Action in personam and action in rem - Whether issues separate and distinct - Whether cause to the contrary established

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This was the plaintiff's application for an order for sale under s. 256 of the National Land Code ('NLC') pursuant to a charge on six parcels of land (collectively 'the land'). The factual background was that pursuant to the letter of offer ('letter of offer'), the plaintiff had granted a fixed term loan facility in the

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sum of RM5.3 million ('the loan') to the defendant. By way of security, the defendant executed the charge in favour of the plaintiff. Subsequently, the defendant defaulted in the repayment of the instalments of the loan as a result of which the plaintiff issued letters to the defendant demanding recovery thereof. The

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defendant then proposed a settlement which the plaintiff agreed, subject to the terms and conditions of the plaintiff's letter dated 11 June 2001. Meanwhile, the Melaka State Government had acquired part of the land and for the above acquisitions, pursuant to the charge, a compensation of RM472,694 was paid to the

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plaintiff. Due to the defendant's further continued default, the plaintiff issued a letter to recover from the defendant the

outstanding arrears of RM646,986.64, stating that should the defendant fail to pay the same, the plaintiff would claim repayment of the entire outstanding loan of RM2,811,254.36. As the defendant had failed to pay the outstanding loan, the plaintiff's solicitor issued to the defendant the notice in Form 16D. *Vide* Melaka High Court civil suit, the plaintiff had, on 24 May 2004, entered summary judgment against the defendant in the sum of RM2,843,300.59 together with interest and costs ('the summary judgment'). The defendant raised issues which were said to constitute 'cause to the contrary': (1) that the plaintiff's letter of offer was a promissory note which had not been stamped and was inadmissible in evidence by reason of the provisions of ss. 2, 41, 47 and 52 of the Stamp Act 1949 ('the 1949 Act') and was null and void; (2) that the plaintiff's charge action herein was premature as the plaintiff has appealed against the acquisition of part of the land and the appeal if allowed would bring about more compensation in which case the outstanding sum due by the defendant to the plaintiff would have to be reduced and (3) that the plaintiff has obtained summary judgment against the defendant and the doctrine of *res judicata* would apply and thus this charge action was an abuse of the process of the court.

Held:

(1) The contention that the letter of offer comes within the definition of 'promissory note' under s. 2 of the 1949 Act was unacceptable. While a promissory note is listed under item 60 in the First Schedule to the 1949 Act, the letter of offer has not found a place in the Schedule. The letter of offer is not an instrument chargeable with stamp duty under s. 41(1) of the 1949 Act. There was no merit in the defendant's contention herein.

(2) A careful reading of the authority cited by the defendant, *Overseas Chinese Banking Corporation Ltd v. Lee Tan Hwa & Anor*, led to the conclusion that there was no issue touching on the acquisition of the charged land or any part thereof. As the factual matrix there did not reveal any land acquisition, it could not be supportive of the defendant's contention based thereon. The crucial clause was cl. 19 in the annexure to the charge which provides in essence for government acquisition of the land and the consequences flowing therefrom. There was

- A no contention by the defendant that cl. 19 had not been complied with by the plaintiff. A case in point was found in *Chung Khiaw Bank Ltd*. In the circumstances, this issue did not constitute cause to the contrary.
- B (3) The plaintiff's entry of the summary judgment against the defendant was governed by O. 14 of the Rules of the High Court 1980 in the civil action based on covenants or contractual rights and obligations while the charge action was filed under O. 83 of the Rules of the High Court 1980 and
- C s. 256 of the NLC which creates statutory rights in favour of the plaintiff. While the former was an action *in personam*, the latter was an action *in rem*. There was no doubt that the issues were sharply contrasting, separate and distinct, which would render the doctrine not even remotely relevant. The
- D defendant's submission herein was devoid of merits. The defendant has failed to establish a cause to the contrary.

[Order in terms of the plaintiff's application in encl. 1 to realize the sum of RM3,640,692.16 outstanding as at 6 July 2006 and fix the auction for 8 November 2006.]

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Case(s) referred to:

- Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (**refd**)
- Chung Khiaw Bank Ltd v. The Government of the State of Sabah & Ors [1994] 2 CLJ 475 SC (**refd**)
- F Co-operative Central Bank Ltd v. Y & W Development Sdn Bhd [1997] 4 CLJ 170 CA (**refd**)
- Dato' Hari Menon v. Texas Encore LLC & Ors [2005] 2 CLJ 688 HC (**refd**)
- Government of Malaysia v. Dato' Chong Kok Lim [1973] 2 MLJ 74 (**refd**)
- Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104
- G CA (**refd**)
- Hongkong & Shanghai Banking Corporation Ltd v. Wan Mohd Wan Ngah [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 HC (**refd**)
- Kandiah Peter v. Public Bank [1993] 4 CLJ 332 SC (**refd**)
- Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC (**refd**)
- H Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC (**refd**)
- Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 FC (**refd**)
- Murugappa Chettiar v. Letchumanan Chettiar [1939] MLJ 296 HC (**refd**)
- NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd [1986] 1
- I MLJ 44 (**refd**)

Overseas Chinese Banking Corporation Ltd v. Lee Tan Hwa & Anor (Goh Ah Chwee & Anor, Interveners) [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198 HC (**refd**) A

Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd [2004] 4 CLJ 466 CA (**refd**)

Satyadhyan Ghosel & Ors v. Sint Deorajin Dobi & Anor AIR [1960] SC 941 (**refd**) B

Legislation referred to:

Moneylenders Act 1951, s. 16(4)

National Land Code, ss. 256(3), 340(2)

Stamp Act 1949, ss. 2, 4, 41(1), 47, 52 C

For the plaintiff - Kee Tong Kiak; M/s Chee Siah Le Kee & Partners

For the defendant - Lee Choon Hei; M/s Paul Cheah & Assoc

Reported by Suhainah Wahiduddin

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JUDGMENT

Low Hop Bing J:

Application

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[1] Before me is encl (1) which is the plaintiff's application for an order for sale under s. 256 of the National Land Code 1965 pursuant to a charge registered *vide* presentation No. 5335/96 Jilid No. 578 Folio 23 ("the charge") on six parcels of land held respectively under GM 316 Lot 758, GM 315 Lot 762, GM 318 Lot 986, GRN 20737 Lot 987, GRN 20738 Lot 988, GRN 6217 Lot No. 989 in the mukim of Sungai Petai, in the State of Melaka (collectively "the land").

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[2] A reference hereinafter to a section is a reference to that section in the National Land Code 1965 unless otherwise stated or the context otherwise requires.

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Factual Background

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[3] Pursuant to the letter of offer dated 21 April 1997 ("the letter of offer"), the plaintiff had granted a fixed term loan facility in the sum of RM5.3 million ("the loan") to the defendant.

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- A** [4] By way of security, the defendant executed the charge in favour of the plaintiff. Subsequently, the defendant defaulted in the repayment of the instalments of the loan from April to September 2000, as a result of which the plaintiff issued letters dated 10 June 2000, 10 July 2000 and 17 October 2000 to the defendant demanding recovery thereof.

[5] On 30 October 2000, the plaintiff *vide* solicitor's letter to the defendant demanded repayment of arrears amounting to RM715,479.99, but the defendant has failed to do so.

- C** [6] *Vide* another letter dated 13 November 2000 issued by the plaintiff's solicitors to the defendant, the plaintiff withdrew the loan and claimed the outstanding sum of RM2,996,117.26 as at 9 November 2000, together with interest and costs.

- D** [7] The defendant then proposed a settlement which the plaintiff has agreed, subject to the terms and conditions of the plaintiff's letter dated 11 June 2001.

[8] Meanwhile, the Melaka State Government had acquired:

- E** (1) 13,447,3785 sq metres in GRN 20737 Lot 987;
(2) 15,119.1565 sq metres in GRN 20738 Lot 988; and
(3) 37.1423 sq metres in GRN 6217 Lot 989.

- F** [9] For the above acquisitions, pursuant to the charge, a compensation of RM472,694 has been paid to the plaintiff on or about 21 August 2003.

- G** [10] Due to the defendant's further continued default, the plaintiff had on 15 October 2003 issued a letter to recover from the defendant the outstanding arrears of RM646,986.64 as at 30 September 2003, stating that should the defendant fail to pay the same, the plaintiff would claim repayment of the entire outstanding loan of RM2,811,254.36 as at 30 September 2003.

- H** [11] As the defendant had failed to pay the said outstanding loan, the plaintiff's solicitor issued to the defendant the notice in Form 16D dated 24 August 2004.

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[12] *Vide* Melaka High Court civil suit No. 22-9-2001, the plaintiff has on 24 May 2004 entered summary judgment against the defendant in the sum of RM2,843,300.59 as at 24 May 2004 together with interest and costs (“the summary judgment”).

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Governing Principles

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[13] It is trite law that in the instant application, s. 256(3) applies and that the court shall order the sale of the land to which the charge relates unless it is satisfied of the existence of “cause to the contrary”.

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[14] In *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36 FC, Gopal Sri Ram JCA speaking for the Federal Court followed *Murugappa Chettiar v. Letchumanan Chettiar* [1939] MLJ 296 HC; and *Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Anor.* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC and elaborated that the burden is on the chargor to show “cause to the contrary” within s. 256(3), which may be established only in three categories of cases viz:

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- (1) any of the exceptions to the indefeasibility doctrine in s. 340;
- (2) the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and
- (3) the grant of an order for sale would be contrary to some rule of law or equity.

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[15] What follows next is my consideration of the issues raised for the defendant which were said to constitute “cause to the contrary”.

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Sections 2, 41, 47 And 52 Stamp Act 1949

[16] Defendant’s learned counsel Mr. Lee Choon Hei took the stand that the plaintiff’s letter of offer is a promissory note which has not been stamped and is inadmissible in evidence by reason of the provisions of ss. 2, 41, 47 and 52 of the Stamp Act 1949 (“the 1949 Act”) and when read with s. 340(2) is null and void.

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[17] Learned counsel Mr. Kee Tong Kiak submitted for the plaintiff that the letter of offer is not an instrument chargeable with duty under ss. 4 and 41 of and the First Schedule to the 1949 Act; adding that only the charge attracts stamp duties, on the basis of *Co-operative Central Bank Ltd v. Y & W Development Sdn Bhd* [1997] 4 CLJ 170.

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- A** [18] In my judgment, the issue herein ie, whether the letter of offer is a promissory note is one of exceptional novelty. The defendant's contention appears to rely on the exceptions to the indefeasibility doctrine in s. 340(2), viz:
- B** (a) fraud or misrepresentation to which the person or body or any agent of the person or body, was a party or privy; or
- (b) where the registration was obtained by a forgery, or by means of an insufficient or void instrument; or
- C** (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
- D** [19] The submission advanced for the defendant did not advert to the specific exception under s. 340(2) which the defendant sought to rely. However, by the process of elimination, the only exception which is of some remote relationship with the defendant's submission appears to be under the second limb of para (b) ie, insufficient or void instrument.
- E** [20] The answer to the issue herein is to be ascertained by way of the true construction to be placed on the expression "promissory note" as defined in s. 2 of the 1949 Act.
- F** [21] Under s. 2 of the 1949 Act, a "promissory note" essentially means any document or writing (except a bank note) containing a promise to pay any sum of money and includes a note promising the payment of any sum of money out of any particular fund which may or may not be available or upon any condition or contingency which may or may not be performed or happen.
- G** [22] I can find no complexity in the definition of "promissory note" in s. 2, neither can a reasonably competent advocate and solicitor be reasonably expected to encounter any difficulty in comprehending the words used therein. In my view, the singularly significant substance of a promissory note is the promise to pay any sum of money.
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[23] In the instant case, the letter of offer exh. ACF1 at pp 14 to 19 of the plaintiff's affidavit in support in encl. (3) has been accepted by the defendant to constitute a mere agreement ie, consensus *ad idem*. However, that agreement is subject to the terms and conditions contained therein, including specifically the execution of a corporate guarantee, the completion of legal documentation by way of a first party first legal charge over the land within three months from the date of offer, the board of directors resolution authorising the acceptance of the loan and the consequences that will flow from the events of default.

[24] In my view the mere fact that the defendant had accepted the terms contained in the letter of offer does not *per se* create an obligation or promise on the part of the defendant to pay any sum of money to the plaintiff. It irks the imagination of a reasonable man to treat the letter of offer as coming within the definition of a promissory note. A promissory note is more closely connected with a moneylending transaction which is usually executed pursuant thereto: see s. 16(4) of the Moneylenders Act 1951. I am therefore unable to accept the contention that the letter of offer comes within the definition of "promissory note" under s. 2 of the 1949 Act.

[25] The instruments chargeable with duty are contained in s. 41(1) of the 1949 Act which reads as follows:

41(1) Subject to this Act and subject to the exemptions contained in this Act and in any written law for the time being in force, the several instruments specified in the First Schedule shall, from and after the commencement of this Act, be chargeable with the several duties specified in such schedule.

[26] While a promissory note is listed under item 60 in the First Schedule to the 1949 Act, the letter of offer has not found a place in the Schedule. I have no difficulty in holding that the letter of offer is not an instrument chargeable with stamp duty under s. 41(1) of the 1949 Act. Consequently s. 47 thereof which provides for the stamping of instruments and s. 52 which excludes the admissibility of instruments not duly stamped, are of no assistance to the defendant.

[27] The defendant's contention, if upheld, would result in myriad letters of offer being liable to stamp duties when Parliament in its wisdom has deemed it unnecessary to do so.

- A [28] The terms and conditions which are legally binding on the parties herein are to be found in the charge which is liable to stamp duty under item 27 in the First Schedule to the 1949 Act and on which stamp duty has been levied and paid. The charge is a statutory instrument, a dealing which the National Land Code
- B 1965 authorises, and s. 340 confers indefeasible title to the plaintiff as the person or body in whose name the charge is for the time being registered: per Hashim Yeop Sani FJ (later CJ(M) in *NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd* [1986] 1 MLJ 44. That judgment was followed by Gopal Sri Ram JCA in *Co-operative Central Bank Ltd, supra*, at p 375.
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[29] I am unable to find any merit in the defendant's contention herein.

D **Land Acquisition And Charge Action**

- [30] It was argued for the defendant that the plaintiff's charge action herein is premature as the plaintiff has appealed against the acquisition of part of the land and the appeal if allowed would bring about more compensation in which case the outstanding sum due by the defendant to the plaintiff would have to be reduced.
- E *Overseas Chinese Banking Corporation Ltd v. Lee Tan Hwa & Anor (Goh Ah Chwee & Anor, Interveners)* [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198 was cited in support.
- F [31] The plaintiff responded that the charge action could proceed notwithstanding the appeal in the acquisition proceedings, seeking support in cl 19 of the annexure to the charge; and *Chung Khiaw Bank Ltd v. The Government of the State of Sabah & Ors* [1994] 2 CLJ 475 SC.
- G [32] The issue here is whether the land acquisitions constitute "cause to the contrary".
- [33] It is appropriate to consider the authority cited for the defendant.
- H [34] A careful reading of the judgment of Eusoff Chin J (later CJ Malaysia) in *Lee Tan Hwa & Anor, supra*, leads me to the conclusion that there was no issue touching on the acquisition of the charged land or any part thereof. As the factual matrix there does not reveal any land acquisition, I am unable to see how it can be supportive of the defendant's contention based thereon.
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[35] In my judgment, the crucial clause is cl. 19 in the annexure to the charge which provides in essence for government acquisition of the land and the consequences flowing therefrom, in particular:

(1) all moneys received as or by way of compensation shall be applied in or towards the discharge or repayment of any money or liability secured by the charge; and

(2) in the event of all such moneys being less than the amount due to the chargee (plaintiff), the chargor shall forthwith pay to the chargee the difference between the amount due and the amount so received and until such payment will also pay interest on such difference at the prescribed interest.

[36] There was no contention by the defendant that cl. 19 has not been complied with by the plaintiff.

[37] A case in point is to be found in *Chung Khiaw Bank Ltd*, *supra*, where the registered owner had charged landed property to the bank for a loan of RM1.4 million. Subsequently, the Government of Sabah acquired part of the property. The Supreme Court through the judgment of Mohamed Dzaiddin SCJ (later CJ Malaysia) allowed the appeal and held that a charge is indivisible and the security was attached to the whole property, and until the property was discharged, the bank's interest is on the whole property.

[38] In the circumstances, I hold that this issue does not constitute a cause to the contrary.

Res Judicata And Abuse Of Process

[39] It was canvassed for the defendant that as the plaintiff has obtained summary judgment against the defendant, the doctrine of *res judicata* would apply and that this charge action is an abuse of the process of the court, relying on:

(1) *Hongkong & Shanghai Banking Corporation Ltd v. Wan Mohd bin Wan Ngah* [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 HC; and

(2) *Lesco Development Corp. Sdn. Bhd. v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC.

A [40] The plaintiff's contention is that the summary judgment was obtained by way of an action *in personam*, while the instant application is an action *in rem*, and so there is no question of *res judicata* arising therefrom, neither is there any abuse of the process of the court, relying on *Kandiah Peter v. Public Bank* [1993] 4 CLJ 332 SC; and *Low Lee Lian*, *supra*.

B [41] In my judgment, the issue for determination under this head is whether the plaintiff's entry of the summary judgment against the defendant constitutes *res judicata* so that this charge action is an abuse of the process of the court.

C [42] For this purpose a good starting point may be established by putting in proper perspective the doctrine of *res judicata* (also referred to as issue estoppel or cause of action estoppel) which has been enunciated with unrivalled clarity by our courts.

D [43] In *Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd* [2004] 4 CLJ 466, Mokhtar Sidin JCA in delivering the majority judgment of the Court of Appeal revisited this doctrine as expounded by the courts in India, England and Malaysia, where his Lordship referred to the position as explained by Peh Swee Chin FCJ (as he then was) in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783, as follows:

E What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*.

F [44] In *Hartecon JV Sdn. Bhd. & Anor. v. Hartela Contractors Ltd.* [1997] 2 CLJ 104, the Court of Appeal, through the judgment of Gopal Sri Ram JCA, referred to the judgment of Sharma J in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 and the judgment of the Indian Supreme Court in *Satyadhyan Ghosel and Others v. Sint Deorajin Dobi and Another* AIR [1960] SC 941 which stated the law on the subject as follows:

The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again ...

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The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

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[45] Parties are therefore bound by the doctrine of *res judicata* from re-agitating an issue that had been resolved in earlier proceedings. (See also *Dato' Hari Menon v. Texas Encore LLC & Ors* [2005] 2 CLJ 688 at pp 699 and 700).

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[46] Applying the above principles to the facts of this case, it needs to be noted that the plaintiff's entry of the summary judgment against the defendant is governed by O. 14 in the civil action based on covenants or contractual rights and obligations while the charge action is filed under O. 83 and s. 256 which creates statutory rights in favour of the plaintiff. While the former is an action *in personam*, the latter is an action *in rem*. There can be no doubt that the issues are sharply contrasting, separate and distinct, which would render the doctrine not even remotely relevant.

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[47] In this regard, the authoritative judgment of the Supreme Court delivered by Eusoff Chin SCJ (later CJ Malaysia) in *Kandiah Peter, supra*, is absolutely illuminating. There, the appellant-chargor had charged certain lands to the respondent-chargee which had pursuant to the charge obtained orders for sale thereon. The chargor had unsuccessfully applied to set aside the orders for sale. Subsequently, the chargor took out a writ claiming *inter alia* a declaration that the charges and annexures thereto were null and void, which was dismissed by the trial judge largely on the ground that the matter was covered by the doctrine of estoppel and *res judicata*. On appeal, the only question for determination by the Supreme Court was whether the doctrine was applicable to bar the chargor's writ action. His Lordship in allowing the appeal held at pp 334 and 335 that:

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A A chargee who makes an application for sale in foreclosure proceedings under s. 256 does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue ...

C It is equally settled law that in order for the doctrine of *res judicata*, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree: 16 *Halsbury's Laws of England* (4th edn) para 1511. This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree.

E In our judgment, where a chargor raises and relies upon facts to show "cause to the contrary" in proceedings brought by the chargees under s. 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither *res judicata* nor cause of action estoppel or issue estoppel are available answers to the chargee to meet the chargor's action.

F [48] Although the above judgment was given in favour of the chargor, the principles would apply *mutatis mutandis* herein where the chargor (as opposed to the chargee in *Kandiah Peter, supra*) is seeking to rely on the doctrine.

G [49] *Kandiah Peter, supra*, was affirmed by another panel of the Supreme Court in *Low Lee Lian, supra*, in the judgment delivered by Gopal Sri Ram JCA, said that by their very nature, proceedings under s. 256 are not concerned with any contractual claims that the chargor may have against the chargee, but whether the chargor has adduced facts that establish cause to the contrary, and if the chargor is unable to sustain his opposition to the making of the order as a proceeding *in rem*, he may nevertheless sue the chargee *in personam* for breach upon the personal covenant or in equity for relief as may be appropriate.

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[50] For completeness, I shall now consider the authorities cited for the defendant.

[51] First, in *Hongkong & Shanghai Banking Corporation Ltd, supra*, the two questions for determination were:

(1) whether the plaintiff chargee was entitled at law and in equity to proceed by way of a civil suit before realising the security under the charge?

(2) If so, whether the plaintiff chargee was entitled to proceed concurrently on all its remedies?

[52] Lamin J (later PCA) answered question (1) in the negative, holding that if the amount realised by the chargee on the sale of the charged land was less than the amount due to the chargee, the chargor shall pay to the chargee the difference thereof pursuant to the terms and conditions of the charge. This part of his Lordship's judgment is in line with cl 19 which I have analysed above under the head "land acquisition and charge action", and so does not support the defendant's contention.

[53] His Lordship also held that the land was within the jurisdiction of the land administrator from whom the plaintiff chargee must obtain the complete remedy, as that was the competent tribunal, and added that to allow the plaintiff chargee to file another action in the High Court where the earlier proceedings had not been completed before the land administrator must be treated as a case of abuse of the process of the court. That was the *ratio decidendi* which arose out of the chargee's duplicity of actions, concurrently before the land administrator and the High Court. I am unable to see any assistance which the defendant may derive therefrom.

[54] Next, in *Lesco Development Corp Sdn. Bhd, supra*, the respondent bank filed a suit against the appellant chargor in the Commercial Division of the Kuala Lumpur branch of the High Court in respect of a loan secured by a charge. Default judgment was obtained by the bank and the chargor had applied to set it aside. Few days later, the bank filed in the Family and Property Division of the same High Court to initiate foreclosure proceedings in which the bank had obtained an order for sale against which the chargor had appealed. The Supreme Court

A through the judgment of Wan Hamzah SCJ (as he then was) allowed the appeal and set aside the order for sale, holding that it is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter.

B [55] I would respectfully observe that the above Supreme Court judgment in *Lesco Development Corp. Sdn. Bhd.*, *supra*, must be read in the light of two other Supreme Court judgments viz in *Kandiah Peter, supra*; and *Low Lee Lian, supra*, both of which I would follow and associate myself with the grounds stated therein.

C [56] In my view, the defendant's submission herein is devoid of merits.

Conclusion

D [57] As the defendant has failed to establish a cause to the contrary, I make an order in terms of the plaintiff's application in encl (1) to realise the sum of RM3,640,692.16 outstanding as at 6 July 2006 and fix the auction for 8 November 2006.

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